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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Austin Chance Evans,
Plaintiff,
vs.
Megann McAllister,
Defendant.

No. CIV 23-132-TUC-CKJ

ORDER

On May 10, 2023, this Court issued an Order which, *inter alia*, denied with leave to resubmit the Application to Proceed in District Court Without Prepaying Fees or Costs (Doc. 2) and the Complaint (Doc. 1). Plaintiff Austin Chance Evans ("Evans") has submitted a new Application to Proceed in District Court Without Prepaying Fees or Costs (Doc. 37) ("Application"), an Amended Complaint (Doc. 36), and a Motion to Submit Waiver of Summons (Doc. 38).

I. Application to Proceed in District Court Without Prepaying Fees or Costs (Doc. 37)

The Court may allow a plaintiff to proceed without prepayment of fees when it is shown by affidavit that he "is unable to pay such fees[.]" 28 U.S.C. § 1915(a)(1). Where an allegation of poverty is inaccurate and made in bad faith, dismissal with prejudice may be appropriate. *Newsome v. Loterzstain*, No. 219CV0307JAMEFBP, 2020 WL 4501813, at *2 (E.D. Cal. Aug. 5, 2020), report and recommendation adopted, No. 219CV0307JAMEFBP, 2020 WL 5412996 (E.D. Cal. Sept. 9, 2020), *citing Escobedo v. Applebees*, 787 F.3d 1226,

1 1234 (9th Cir. 2015).

2 Evan's original affidavit, dated March 17, 2023, indicated Evans expected to receive
3 \$768.00 in the next month in gifts, had received an average of \$2,768.00 in monthly gifts for
4 the past 12 months, and did not list any expenses. (Doc. 2). Evans' new affidavit in support
5 of his Application, dated May 11, 2023, indicates Evans does not expect any income for the
6 next month, received an average of \$60.00 in monthly gifts for the past 12 months, and did
7 not list any expenses. (Doc. 37). Evans states he had incorrectly believed he was to list
8 annual amounts when completing the original form. The Court accepts Evans' explanation
9 for the contradictory information. The Court finds Evans is unable to pay the fees and will
10 grant the request.

11 However, the Court recognizes the Amended Complaint indicates that, in February
12 2023, Evans had more than one "staff." Evans is advised that, if the Court becomes aware
13 his allegation of poverty is untrue and has been made in bad faith, the Court will consider if
14 dismissal with prejudice of this action is appropriate.

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16 II. *Motion to Submit Proof of Service* (Doc. 38)

17 Evans requests to submit a waiver of summons from the attorney of Defendant
18 Megann McAllister's attorney. Although Evans' Amended Complaint was not accepted by
19 the Court when the request was made, the Court herein accepts the Amended Complaint.
20 Therefore, the Court will grant this request. Evans will be directed to file the Waiver of the
21 Service of Summons.

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23 III. *Screening Order*

24 As the Court previously stated, it is required to dismiss a case if the Court determines
25 that the allegation of poverty is untrue, 28 U.S.C. § 1915(e)(2)(A), or if the Court determines
26 that the action "(i) is frivolous or malicious; (ii) fails to state a claim on which relief may be
27 granted; or (iii) seeks monetary relief against a defendant who is immune from such relief."
28 28 U.S.C. § 1915(e)(2)(B). May 10, 2023, Order (Doc. 28, p. 4). In this case, the Amended

1 Complaint is to contain a "short and plain statement of the claim showing that the pleader is
2 entitled to relief[.]" Fed.R.Civ.P. 8(a); May 10, 2023, Order (Doc. 28, p. 5), and must set
3 forth sufficient facts that serve to put defendants on notice as to the nature and basis of the
4 claim(s).

5 Further, the United States Supreme Court has determined that, in order to survive a
6 motion to dismiss for failure to state a claim, a plaintiff must allege "enough facts to state a
7 claim to relief that is plausible on its facts." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544,
8 570 (2007); May 10, 2023, Order (Doc. 28, pp. 5-6). As the Ninth Circuit has stated:

9 "A claim has facial plausibility," the Court explained, "when the plaintiff pleads
10 factual content that allows the court to draw the reasonable inference that the
11 defendant is liable for the misconduct alleged." 129 S.Ct. at 1949. "The plausibility
12 standard is not akin to a 'probability requirement,' but it asks for more than a sheer
13 possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S.
at 556, 127 S.Ct. 1955). "Where a complaint pleads facts that are 'merely consistent
with' a defendant's liability, it 'stops short of the line between possibility and
plausibility of entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557, 127
S.Ct. 1955).

14 In sum, for a complaint to survive a motion to dismiss, the non-conclusory "factual
15 content," and reasonable inferences from that content, must be plausibly suggestive
of a claim entitling the plaintiff to relief. *Id.*

16 *Moss v. U.S. Secret Service*, 572 F.3d 962 (9th Cir. 2009); May 10, 2023, Order (Doc. 28,
17 p. 6). Further, this Court takes as true all allegations of material fact and construes them in
18 the light most favorable to Evans. *See Cervantes v. United States*, 330 F.3d 1186, 1187 (9th
19 Cir. 2003); May 10, 2023, Order (Doc. 28, p. 6). Nonetheless, the Court does not accept as
20 true unreasonable inferences or conclusory legal allegations cast in the form of factual
21 allegations. *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981); May 10,
22 2023, Order (Doc. 28, pp. 6-7).

23 24 IV. *Fraud*

25 Evans alleges fraud as a claim against McAllister. To state a claim of fraud, a
26 plaintiff must allege that a defendant made "a false and material representation, with
27 knowledge of its falsity or ignorance of its truth, with intent that the hearer would act upon
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1 the representation in a reasonably contemplated manner, and that the hearer, ignorant of the
 2 falsity of the representation, rightfully relied upon the representation and was thereby
 3 damaged." *Dawson v. Withycombe*, 163 P.3d 1034, 1046 (Ariz.App. 2007).

4 Evans alleges McAllister promised Evans "a place to live in a 2 bedroom apartment
 5 along with all expenses paid in [Coeur d'Alene, Idaho] for 2 years." Am. Complaint (Doc.
 6 36, p. 1). Evans also alleges McAllister promised Evans "a place to stay in Las Vegas,
 7 NV[.]" *Id.* at 2. Evans alleges he purchased multiple items for McAllister and implies such
 8 purchases were made in reliance on the promises given to him by McAllister. The facts
 9 alleged by Evans do not state a claim for fraud. Rather, Evans does not include any
 10 allegation that McAllister made "a false and material representation, with *knowledge* of its
 11 falsity or *ignorance* of its truth, with *intent* that the hearer would act upon the representation
 12 in a reasonably contemplated manner," *Dawson*, 163 P. 3d at 1046, *emphasis added*, as
 13 opposed to McAllister changing her mind. Indeed, Evans alleges a relationship existed for
 14 nearly three years, including physical intimacy at certain times of the relationship. The
 15 factual allegations do not "raise a right to relief above the speculative level." *Twombly*, 550
 16 U.S. at 570. Further, the factual allegations are insufficient for the Court to draw a
 17 reasonable inference that McAllister acted with knowledge of the falsity or ignorance of the
 18 truth of the promises, with the intent Evans would reasonably act upon the representations.
 19 The Court finds it appropriate to dismiss the fraud claim for failure to state a claim upon
 20 which relief may be granted.

21 22 V. Defamation

23 Evans asserts a claim of defamation in his Complaint. "Oversimplifying, libel is a
 24 written or visual defamation, while slander is an oral defamation." *Boswell v. Phoenix*
 25 *Newspapers, Inc.*, 152 Ariz. 1, 6 n. 4, 730 P.2d 178 n. 4 (App. 1985). "One who publishes
 26 a false and defamatory communication concerning a private person . . . is subject to liability,
 27 if, but only if, he (a) knows that the statement is false and it defames the other, (b) acts in
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reckless disregard of these matters, or (c) acts negligently in failing to ascertain them." *Desert Palm Surgical Grp., P.L.C. v. Petta*, 343 P.3d 438, 449 (Ariz.App. 2015), *citations omitted*.

Evans has alleged that, in February 2023, McAllister published statements via emails to Evans' staff referring to Evans' "stupid" rules of Evans, Evans threatening CPS and lawsuits, requesting information about Evans for her protection against him, Evans contacting or doxing McAllister, and Evans harassing McAllister. Evans also alleges McAllister was untruthful and alleged Evans was stalking her in obtaining a protection order.¹

As to the allegations regarding email statements and statements related to the protection order, the Court finds Evans has alleged false and defamatory communications by McAllister concerning Evans. Further, Evans has adequately alleged McAllister knew the statements were false and defamed Evans, or acted in reckless disregard of these matters or acted negligently in failing to ascertain them. The Court finds Evans has stated a libel claim upon which relief may be granted against McAllister for the email statements to staff.

However, as to the statements made in obtaining a protective order, the Court finds McAllister is immune from liability for these statements based on the litigation privilege. *Taraska v. Brown*, No. 1 CA-CV 18-0714, 2019 WL 6320968, at *2 (Ariz. Ct. App. Nov. 26, 2019); *Ledvina v. Cerasani*, 213 Ariz. 569, 571, ¶ 4 (App. 2006) ("When statements are absolutely privileged, the speaker is immune from civil liability and courts do not inquire into the declarant's motives or whether the statements were made in good faith."); *see also* May 10, 2023, Order (Doc. 28, p. 8). The Court finds Evans has failed to state a defamation claim against McAllister for any statement made in writing or orally in the order of protection proceedings.

¹It is not clear if these allegations were made in documents submitted to the court or orally in court proceedings.

1 VI. *Emotional Distress*

2 Evans purports to state a claim for emotional distress, based on alleged untrue
3 statements made by McAllister during the order of protection proceedings and sending
4 messages to Evans' staff. Evans asserts he has been extremely distraught and on some days
5 he is unable to keep food down, unable to sleep, and unable to enjoy his usual pastimes. He
6 does not clarify if he is seeking to state a claim for intentional or negligent infliction of
7 emotional distress.

8 To the extent Evans' claim is based on statements made during the order of protection
9 proceedings, the Court finds the Court finds McAllister is immune from liability for these
10 statements based on the litigation privilege. *Taraska v. Brown*, No. 1 CA-CV 18-0714, 2019
11 WL 6320968, at *2 (Ariz. Ct. App. Nov. 26, 2019); *Drummond*, 127 Ariz. at 125
12 ("Defamatory statements contained in pleadings are absolutely privileged if they are
13 connected with or have any bearing on or are related to the subject of inquiry." *Id.* (emphasis
14 added). The Court finds Evans has failed to state an emotional distress claim against
15 McAllister for any statement made in writing or orally in the order of protection proceeding.

16 To state a claim for intentional infliction of emotional distress, a plaintiff must allege
17 (1) the conduct of defendant was "extreme" and "outrageous," (2) defendant intended to
18 cause emotional distress or recklessly disregarded the near certainty that such distress would
19 result from his conduct, and (3) severe emotional distress did occur as a result of defendant's
20 conduct. *Citizen Publishing Co. v. Miller*, 115 P.3d 107, 111 (Ariz. 2005); *Wells Fargo Bank*
21 *v. Arizona Laborers, Teamsters, and Cement Masons Local No. 395 Pension Trust Fund*,
22 38 P.3d 12 (Ariz. 2002) (discussing difference between negligent and intentional torts). The
23 acts must be "so outrageous in character and so extreme in degree, as to go beyond all
24 possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a
25 civilized community." *Mintz v. Bell Atlantic Systems Leasing International, Inc.*, 905 P.3d
26 559, 563 (Ariz.App. 1995), *quotation omitted*. Further, the defendant must either intend to
27 cause emotional distress or recklessly disregard the near certainty that such distress will result
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1 from his conduct. *Ford v. Revlon*, 734 P.2d 580 (Ariz. 1987).

2 A claim for negligent infliction of emotional distress requires that the "the emotional
3 distress inflicted 'must be manifested as a physical injury.'" *Rowland v. Union Hills Country*
4 *Club*, 157 Ariz. 301, 304, 757 P.2d 105, 108 (App. 1988).

5 Evans bases his emotional distress claim on the messages McAllister sent to his staff.
6 The messages included reference to obtaining an order of protection against Evans (including
7 asking email recipient to contact McAllister on Evans' behalf and Evans doxxing
8 McAllister), stupid rules, and harassment. The messages also requested the recipient to
9 forward screenshots to her if the recipient saw Evans sending, mentioning, or threatening
10 (CPS, lawsuits) McAllister. Evans asserts he is seeking expert treatment. As the Court
11 discussed in its May 10, 2023, Order, it is not aware of any Arizona case that discusses
12 whether or when "breaking up" a relationship may constitute extreme or outrageous conduct.
13 However, in *Cochran v. Cochran*, 65 Cal.App.4th 488 (App. 1998), the feuding that
14 followed a "long-standing intimate relationship" often included "an exchange of hostile
15 unpleasantries which are intended to sting whoever sits at the delivery end." *Cochran*, 65
16 Cal.App.4th at 498. In that case a pattern of threats was followed by a death threat. *Id.* at
17 498-99. The court found that the threats were not actionable because they were "the kind of
18 boastful, peevish, spleen-venting" threats "which frequently occurs between the parties to an
19 intimate relationship gone bad." *Id.* at 499. However, there were no allegations that the
20 person ever tried to follow through on any of the threats. *Id.*; *see also Guzman v. Finch*, No.
21 19CV412-MMA (MDD), 2019 WL 3766659, at *5 (S.D. Cal. Aug. 9, 2019) (where
22 defendant acted on threats (i.e., threatened plaintiff's "career, blocked [plaintiff's] mother's
23 phone number from her phone, prohibited [plaintiff] from speaking to her best friend,
24 employed psychological tactics to control [plaintiff], raped [plaintiff], and grabbed
25 [plaintiff's] arms and yanked her with so much force that [plaintiff] fell and broke her
26 fibula") and where plaintiff allegedly fell into a deep depression and attempted to commit
27 suicide, dismissal of claim was not appropriate). Indeed, one court has quoted from a
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1 treatise:

2 Most [relationship break-ups] do not include conduct that will support an
3 action for emotional distress. While most [break-ups] see their share of
4 insults, indignities, threats, annoyances and petty oppressions as well as
transient and trivial mental anguish, the Restatement expressly excludes such
things from forming the basis for liability.

5 Bradley A. Case, Note, *Turning Marital Misery into Financial Fortune: Assertion of*
6 *Intentional Infliction of Emotional Distress Claims by Divorcing Spouses*, 33 U.
Louisville J. Fam. L. 101, 115 (1994).

7 *McCulloh v. Drake*, 2001 WY 56, ¶ 24, 24 P.3d 1162, 1169 (Wyo. 2001); *see also Ford v.*
8 *Revlon*, 734 P.2d 580, 585 (Ariz. 1987) (adopting the Restatement articulation of the
9 standard of liability for intentional infliction of emotional distress claims); *Ball v. Prentice*,
10 781 P.2d 628, 630 (Ariz.App. 1989) ("Arizona courts have permitted recovery for negligent
11 infliction of emotional distress even without impact if other criteria appear, and have adopted
12 the law as provided by Restatement (Second) of Torts, §§ 313, 436 and 905 (1965).").

13 Moreover, the Court is not aware of any case in the United States that has determined
14 that a defendant telling someone a plaintiff had threatened to dox a defendant, contact CPS,
15 or file a lawsuit, or informing someone defendant had obtained a protection order constitutes
16 extreme or outrageous conduct. In this case, the Complaint contains less actionable
17 allegations that in *Cochran*. Simply put, the Court does not find the conduct alleged by
18 Evans to be extreme or outrageous. *See e.g., Pyle v. Pyle*, 11 Ohio App. 3d 31, 34, 463
19 N.E.2d 98, 104 (1983) (in context of divorce proceeding, party suffered headaches, stomach
20 aches, and had trouble sleeping; however, the "law cannot protect against or provide damages
21 for all of the mental anguish which may arise from the emotionally fraught atmosphere of"
22 a relationship break-up); Res. (2nd) of Torts § 46 (May 2023) ("There is no occasion for the
23 law to intervene in every case where some one's feelings are hurt.").

24 Notably, Evans is not alleging McAllister took the alleged actions (e.g., threaten to
25 contact CPS, threaten to dox Evans, harass Evans). Rather, Evans is alleging McAllister told
26 others that Evans took the alleged actions. *See e.g., id.* ("there may perhaps be situations in
27 which the actor is privileged to resort to extreme and outrageous words, or even acts, in
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1 self-defense against the other, or under circumstances of extreme provocation which
2 minimize or remove the element of outrage"). While such statements may provide a basis
3 for defamation (as previously discussed), the allegations that McAllister made such
4 statements in the context of a relationship breakup are not extreme and outrageous.

5 The Court finds Evans has failed to state an emotional distress claim upon which relief
6 may be granted.

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8 *VII. Subject Matter Jurisdiction*

9 Evans' Amended Complaint attaches itemized damages. However, in light of the
10 dismissal of the fraud and emotional distress claims, it is not clear if Evans' Amended
11 Complaint establishes subject matter jurisdiction. *See* 28 U.S.C. § 1332. Should McAllister
12 not raise this issue in responding to the Amended Complaint, the Court will direct the parties
13 to brief this issue. *See* Fed.R.Civ.P. 12(h)(3) ("If the court determines at any time that it
14 lacks subject-matter jurisdiction, the court must dismiss the action."); *Sauk-Suiattle Indian*
15 *Tribe v. City of Seattle*, 56 F.4th 1179, 1189, n. 14 (9th Cir. 2022).

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17 *VI. Conclusion*

18 The Court has determined Evans has stated a claim for defamation based on the
19 emails. However, the Court has found Evans has failed to state claims upon which relief may
20 be granted for fraud, defamation based on statements made in the order of protection
21 proceedings, and emotional distress. The Court will direct McAllister to answer or otherwise
22 respond to the defamation claim based on the emails alleged in the Amended Complaint.

23 Accordingly, IT IS ORDERED:

24 1. The Application to Proceed in District Court Without Prepaying Fees or Costs
25 (Doc. 37) is GRANTED.

26 2. The Motion to Submit Waiver of Summons (Doc. 38) is GRANTED. Evans
27 shall file the Waiver of the Service of Summons completed by counsel for McAllister.
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3. If Evans does not file the Waiver of the Service of Summons completed by counsel for McAllister, Evans shall complete service of the Summons and Amended Complaint on McAllister within 90 days of the filing of the Complaint or within 60 days of the filing of this Order, whichever is later. If McAllister fails to complete service, the action may be dismissed as to any non-served defendant. Fed.R.Civ.P. 4(m); LRCiv 16.2(b)(2)(B)(ii).

4. Evans' claims for fraud, defamation based on statements made in obtaining a protective order, and emotional distress are DISMISSED.

5. McAllister must answer or otherwise respond to the defamation claim based on McAllister's emails alleged in the Amended Complaint.

DATED this 13th day of June, 2023.

Emily H. Jorgenson

Cindy K. Jorgenson
United States District Judge